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Vision of Elk River, Inc. *and* Susie Stetler, an Individual. Case 18–CA–019200

September 28, 2012

DECISION AND ORDER

BY CHAIRMAN PEARCE AND MEMBERS HAYES AND BLOCK

On July 7, 2010, Administrative Law Judge Richard A. Scully issued the attached decision. The Acting General Counsel filed exceptions and a supporting brief, and the Respondent filed an answering brief. The Respondent also filed cross-exceptions and a supporting brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions only to the extent consistent with this Decision and Order.

The judge dismissed the complaint's allegations that the Respondent violated Section 8(a)(3) and (1) of the Act by laying off employees Trudy Edick, Anne Martin, Susie Stetler, Sharron Lynas, and Susan Walberg because of their union activities, and Section 8(a)(4) and (1) by laying off Edick, Martin, and Stetler because of their actual or perceived participation in Board proceedings. The judge reasoned that the Acting General Counsel failed to prove that the layoffs were unlawfully motivated. We disagree. As explained below, the record contains ample evidence that the layoffs were unlawfully motivated, and the Respondent failed to prove that it would have laid off any of the five alleged discriminatees even absent her union activities and/or participation in Board proceedings. Accordingly, we find that the layoffs violated the Act, and we shall order the Respondent to take appropriate remedial action.

I. FACTUAL BACKGROUND

Vision of Elk River, Inc. (the Respondent) transports students to schools by bus and van pursuant to a contract with the Elk River School District in Minnesota. Some

of the Respondent's bus routes are special education routes on which an aide assists a driver in transporting special needs students. Until August 2009, the Respondent employed Trudy Edick, Sharron Lynas, and Susan Walberg as aides, and Susie Stetler and Anne Martin as drivers.

A. The Union's Organizing Efforts and the Respondent's Express Desire to "Get Rid" of "Union People"

Service Employees International Union, Local 284 (the Union) attempted to organize the Respondent's drivers and aides on several occasions. The Board conducted elections in March 2003 and September 2007, and the employees voted against representation in each instance.²

In June 2007, during the second organizing campaign, the Respondent held a picnic to celebrate the end of the school year. Employee Terry Forner, who opposed the Union, approached Manager of Operations Brent Orr and asked, "[W]hat are you going to do about the union people?" Orr responded, "[W]e have to be really really careful how we get rid of them." Later that day, in a separate conversation, Forner asked General Manager Mark Ostwald, "[H]ow are you going to take care of the union people?" Ostwald replied that he had "wanted to get rid of them the last union vote," but that Arlene Cunningham, another manager at that time, had talked him out of it.

B. The Discriminatees' Union Activity

Each of the five alleged discriminatees actively supported the Union in its attempts to organize the drivers and aides:

Trudy Edick, a 6-year veteran at the time of her layoff, was a vocal supporter of the Union. In 2007, Edick signed an authorization card, solicited her coworkers to sign authorization cards at work, and wore a union button to work. Around September 2007, a union newsletter featured a photograph of Edick alongside a quotation in which she expressed support for the Union.

Susie Stetler worked for the Respondent for 7 years prior to her layoff in August 2009. Before joining the Respondent, she was employed directly by the school district and was a member of the Union. Because of her union experience, she was approached by coworkers at the Respondent's facility "on a daily basis" and asked about the Union. Additionally, Stetler signed an authorization card in 2007.

Anne Martin, a 7-year veteran at the time of her layoff, signed an authorization card in 2007. Martin attended union meetings and wore a union button throughout the

¹ The Respondent and the Acting General Counsel have effectively excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings

² After the events in this case, the Union conducted a third campaign, which resulted in another election loss in March 2010.

Respondent's day long annual meeting in September 2007. Of the 100 or so employees at that meeting, approximately 10 employees were union buttons.

Sharron Lynas, also a 7-year veteran at the time of her layoff, was a leader among the Union's supporters. Lynas served on the Union's organizing committee during the 2007 campaign. In May 2007, she personally handed Orr a letter that informed the Respondent of the Union's ongoing organizing campaign. The letter was signed by Lynas and eight other employees on the committee. Also in 2007, Lynas hosted union meetings at her home and visited the homes of other employees to solicit cards. Some employees who received home visits notified the Respondent about them. A union newsletter circulated to card signers around September 2007 featured a photograph of Lynas and quoted her as stating, "I am voting YES...."

Susan Walberg, a 5-year veteran at the time of her layoff, signed an authorization card in 2007 and spoke to coworkers Edick, Lynas, Stetler, and Don Williams about the Union, stating that they should unionize. Walberg worked out of the Respondent's facility in the city of Rogers, but travelled to the Elk River facility each day to have lunch there with her friends Stetler, Edick, and Martin.

C. The Respondent's Reaction to Employees' Protected Activity

Sometime before the September 14, 2007 election, Orr and Manager James O'Neill summoned Edick into Orr's office and accused her of furnishing the Union with a list of employees' names and addresses to which she was privy as part of her job duties. Edick denied the accusation. Later, Edick informed the Union about the confrontation with Orr, and the Union filed an unfair labor practice charge. In November or December 2007, Edick was on medical leave following a hospital stay. She visited the Elk River facility and met with Orr in his office to discuss a return to work. During that conversation, Orr accused Edick of having "pressed charges on him." Edick denied that she had filed a charge, explaining that she had merely informed the Union.³ Before the meeting ended, Orr and Edick settled her return to work. The Union withdrew its charge on an unspecified date.

In September 2007, shortly after the second election, Orr, in the presence of O'Neill, instructed Forner to write up prounion employee Pauline Hirning for talking to Forner about the Union. Forner replied that he would, but he never did.

In 2008, the General Counsel issued a complaint in a separate case alleging that the Respondent unlawfully discharged employee Hirning. In connection with that case, Stetler and Martin furnished affidavits to the Board, and the General Counsel subpoenaed them to testify at a hearing scheduled for July 16, 2008. Both Stetler and Martin told Colleen Smith, the Respondent's special education transportation coordinator, that they had been subpoenaed and would need to take the day off from work. Smith approved their requests for time off. An informal settlement was reached in the Hirning matter on July 7, 2008, and hence the case never went to a hearing. Shortly after the settlement, Manager of Operations Orr both posted in the break room and circulated to the employees a six-page memo outlining a "history of charges, complaints and Union action" (the "history of charges" memo), which described various unfair labor practice charges and other complaints filed against the Respondent in 2007 and 2008 and which estimated the costs incurred by the Respondent to defend against them.

D. The Events of 2009

In April 2009, the school district informed the Respondent that it was changing its policy regarding the assignment of bus aides. Previously, an aide served on each special education bus. During the upcoming school year, however, an aide would be assigned to a bus only if it served a specialneeds student who required an aide's services. Additionally, in the summer of 2009, the Respondent and the school district negotiated a new contract with a "three-tier system" under which each bus would run three routes each morning and afternoon. In the past, buses had run only two routes each morning and afternoon. The changes would result in a need for fewer buses and employees.

In a memo dated June 5, 2009, the Respondent informed employees that the school district had proposed a number of significant changes to its transportation services in an effort to cut costs. The memo stated that "[t]he company can offer a reasonable assurance of employment next fall to all employees who are willing to work with the company in positive and constructive ways in implementing necessary changes."

In late August 2009, Special Education Transportation Coordinator Smith began planning the special education routes for the upcoming school year, implementing the new three-tier system and the revised policy on aides. Smith determined that the Respondent was overstaffed and would need to lay off two drivers and three aides. Smith was primarily responsible for recommending employees for layoff because General Manager Ostwald had fallen seriously ill and was hospitalized during the last half of August.

³ Edick testified that she was referring to the Union's charge that Orr accused Edick of furnishing employees' names and addresses to the Union.

To help out during Ostwald's illness, the Respondent in mid-August retained Orr, who had recently been laid off, to work for the Respondent as a consultant. Orr gave Smith a model matrix he had used a few years earlier when laying off drivers. The matrix took into consideration four objective factors: seniority, previous year's attendance, previous year's safety record, and whether the employee was willing to drive every day in the morning and afternoon. Rather than reusing these objective factors, Smith revised the matrix criteria, eliminating quantifiable factors regarding the employees' safety record and willingness to work every day and adding a factor regarding "professionalism." This latter factor was not based on objective data, but rather on Smith's own recollection and assessment of the employee. Smith's revised matrix had three factors: seniority, previous year's attendance, and previous year's professional relationships. A driver or aide could also receive a fivepoint bonus if the school district or a parent had placed a specific request with Smith for that employee.

According to Orr's uncontested testimony, Smith and Orr worked together in applying the new matrix. Smith looked up the employees' seniority and attendance scores and reported them to Orr, who wrote them down. In calculating employees' attendance scores, Smith referred to her day planner, as opposed to payroll records. Smith's day planner was inaccurate: as the Respondent concedes, Smith gave incorrect attendance scores to 19 of 28 employees. Orr was also present when Smith rated employees' professional relationships. In rating employees on this factor, Smith relied on her memory and did not solicit input from other managers or employees. Smith admitted making at least one mistake on the professional-ism scores.⁴

Based on Smith's recommendations, the Respondent subsequently laid off Stetler and Martin as the two lowest rated drivers and Edick, Lynas, and Walberg as the three lowest rated aides. The Respondent did not formally notify the alleged discriminatees about their layoffs, but only informed them that it was not assigning them routes when the employees called or visited the Respondent's facility shortly before the start of the school year.

II. THE COMPLAINT AND THE JUDGE'S DECISION

The Acting General Counsel alleged that the Respondent violated Section 8(a)(3) by selecting Edick, Lynas, Walberg, Stetler, and Martin for layoff and that the se-

lection of Edick, Stetler, and Martin also violated Section 8(a)(4).

The judge dismissed the complaint in its entirety, reasoning that the Acting General Counsel failed to prove that the Respondent selected the alleged discriminatees for layoff because of their union activities and/or participation in Board proceedings. The judge found that each of the alleged discriminatees had engaged in union activity, that three of them (Edick, Martin, and Stetler) had either participated in Board proceedings or were believed to have done so, and that the Respondent knew about both sets of activities. The judge further found that Orr's and Ostwald's comments in 2007 demonstrated union The judge concluded, however, that those comments were too remote in time to shed light on the Respondent's motives in the layoff decisions made in September 2009. Additionally, although finding that Smith's layoff matrix was "irrational and unjustifiable in many respects, and was applied in a careless and manipulative manner to target specific employees," the judge stopped short of finding that the matrix and the manner in which it was applied evidenced an unlawful, discriminatory motive for the layoff selections. The judge pointed to the lapse in time between the most recent evidence of the Respondent's union animus (2007) and the layoffs (2009).

III. ANALYSIS

For the reasons that follow, we reverse the judge's decision and find the unfair labor practices as alleged.

A. The 8(a)(3) Allegations

The legal standard for evaluating whether the Respondent selected the five employees for layoff because of their union activities in violation of Section 8(a)(3) is governed by the burden-shifting framework set forth in Wright Line, 251 NLRB 1083 (1980), enfd. 622 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982). Under Wright Line, the Acting General Counsel bears an initial burden of proving that union activity was a motivating factor in the decision to lay off the five alleged discriminatees.⁵ He can satisfy his burden by showing that (1) the employees engaged in union activity; (2) the employer had knowledge of that union activity; and (3) the employer bore animus toward the employees' union activity. Camaco Lorain Mfg. Plant, 356 NLRB No. 143, slip op. at 3–4 (2011). An employer's union animus and its unlawful motivation may be inferred from circum-

⁴ Employee Janelle Jensen mistakenly received a perfect 20 for professionalism. Smith testified that Jensen should have received a 15 because an employee had complained about her.

⁵ It is undisputed that the operational changes mandated by the Elk River School District necessitated the layoff of two drivers and three aides. The theory of the complaint is that the Respondent selected the five alleged discriminatees from among its employees because of their protected activities.

stantial evidence, including the suspicious timing of the adverse action or the pretextual nature of the employer's proffered justification for it. See id. (timing); *Center Service System Division*, 345 NLRB 729, 749-750 (2005) (pretext), enfd. in relevant part 482 F.3d 425 (6th Cir. 2007); *Whitesville Mill Service Co.*, 307 NLRB 937, 937 (1992) (pretext). If the General Counsel meets his initial burden, an employer may successfully defend by proving that it would have taken the adverse action even absent the alleged discriminatee's union activity. *Camaco Lorain Mfg. Plant*, supra.

1. The alleged discriminatees' union activity

As detailed above, each of the alleged discriminatees engaged in union activities, including attending union meetings, wearing union buttons, signing union authorization cards, and soliciting coworkers to sign cards. The Respondent contends that Walberg did not engage in any union activity, and that Walberg admitted as much at the hearing. However, Walberg's concession was limited to the period after September 2007. The record clearly establishes that, before September 2007, Walberg signed an authorization card and spoke positively about the Union to several coworkers. 6

2. The Respondent's knowledge of the discriminatees' union activity

Next, we adopt the judge's finding that the Acting General Counsel proved that the Respondent knew or suspected that each of the alleged discriminatees engaged in union activities. See, e.g., *Kajima Engineering & Construction*, 331 NLRB 1604, 1604 (2000) (proof that employer suspected that employee engaged in union activity satisfies *Wright Line*'s knowledge requirement).

(a) Employees Edick and Lynas

Manager Orr knew that Edick told union officials that he had accused her of furnishing the Union with employees' names and addresses. Further, the Respondent knew, from the letter that Lynas hand-delivered to Orr, that Lynas served on the Union's organizing committee.

On cross-exception, the Respondent argues that Orr's knowledge is insufficient to satisfy the Acting General Counsel's initial burden of proving knowledge by the Respondent. The Respondent claims that there must be proof that the specific decisionmaker knew about an al-

leged discriminatee's union activity. Here, the Respondent argues, coordinator Smith alone made the layoff decisions and that the record fails to demonstrate that she had knowledge of the alleged discriminatees' union activities.

The Respondent's argument fails for two reasons. First, Board precedent does not require direct evidence that the manager who took an adverse employment action against an employee personally knew of that employee's union activity. Rather, the Board imputes a manager's or supervisor's knowledge of an employee's union activities to the decisionmaker, unless the employer affirmatively establishes a basis for negating such imputation. See, e.g., *State Plaza Hotel*, 347 NLRB 755, 756 (2006).⁷ In this case, there is no basis for declining to impute Orr's knowledge to Smith.⁸ Indeed, the judge discredited Smith's denial that she lacked knowledge of the employees' union activities.

Second, the record in any case shows that *Orr himself* played a role in the layoff decisions. Orr testified that Smith added the five-point bonus feature—which resulted in Stetler receiving a lower total score than any employee not laid off—to the layoff calculus as a result of his discussion with Smith. Furthermore, Orr and Smith both testified that Orr was present in the room during the layoff selection process and helped Smith record employees' matrix scores. Thus, it is reasonable to conclude that Orr's knowledge of the two employees' union activities factored into Smith's layoff recommendations.

(b) Employees Martin and Stetler

We also find that the evidence supports the inference that the Respondent knew of the union activity of employees Martin and Stetler.

We infer that the Respondent knew that Martin wore a union button during the Respondent's 2007 annual meeting. Martin wore the button openly, the meeting was a day long event, and only approximately 10 employees wore a union button that day. Under the circumstances, it is more likely than not that Martin's open union activity was observed by a supervisor or manager. Compare *Flex-N-Gate*, 358 NLRB No. 76, slip op. at fn. 1 (2012)

⁶ We observe that, although Stetler, Martin, and Walberg may not have been prominent union adherents or leaders, Sec. 7 of the Act protects rank-and-file supporters as well as energetic activists. Indeed, to an employer with anti-union animus, rank-and-file union support may be a particular concern, for winning union representation requires majority support among employees and followers, as well as leaders, in the workforce.

⁷ Compare *Music Express East, Inc.*, 340 NLRB 1063, 1064 (2003) (declining to impute supervisor's knowledge to employer because supervisor supported the union and did not relay knowledge to decisionmaker); *Ready Mixed Concrete Co.*, 317 NLRB 1140, 1144, fn. 18 (1995) (no imputation where employer proved that supervisor did not share his knowledge with other supervisors and did not take part in decision), enfd. 81 F.3d 1546 (6th Cir. 1996).

⁸ Although Smith testified that she lacked knowledge of the employees' union activities, the judge discredited that testimony, explaining, "I cannot credit [the Respondent's] claims that it did not know or suspect union support on the part of [the alleged discriminatees]."

(inferring knowledge based, in part, on employee's display of union button in area where he was observed by managers on one occasion). Our dissenting colleague contends that our inference is mere speculation, but the Respondent's keen interest in its employees' union activities is amply demonstrated here, and Martin presumably wore a button precisely to be seen by others.

In addition, we find that the Respondent knew or suspected that Martin and Stetler had engaged in union activity, based on their support of employee Hirning's unfair labor practice charge. In its "history of charges" memo, the Respondent wrote that "Pauline Hirning, along with union organizers from the SEIU, solicited voluntary testimony from company employees on behalf of charges being made by Hirning against the company" (emphasis added) and that such employees were subsequently subpoenaed to testify at the hearing. Coordinator Smith knew that Martin and Stetler were two of the subpoenaed employees. Based on the memo, we find, as did the judge, that the "Respondent considered [subpoenaed] employees to be supporters of Hirning and the Union." Our dissenting colleague insists that we read too much into the memo, but he fails to give the memo—hardly an ordinary document—the significance it plainly deserves.

(c) Employee Walberg

Last, we find that the Respondent knew, or at least suspected, that Walberg actively supported the Union.

For the 2007–2008 school year, which began shortly after the second election, the Respondent transferred Walberg from its facility in Elk River to its facility in Rogers, Minnesota, yet every day, Walberg travelled to Elk River to eat lunch with alleged discriminates Stetler, Edick, and Martin, who were known union supporters. Given Walberg's close association with those union's supporters, and the Respondent's close scrutiny of special education department employees (described by the judge), we agree with the judge's finding that the Respondent knew or suspected that Walberg supported the Union. See, e.g., Martech MDI, 331NLRB 487, 505-506 (2000), enfd. 6 Fed. Appx. 14 (D.C. Cir. 2001) (union supporter who ate lunch with union activists was discriminatorily targeted for layoff). See also Price's Pic-Pac Supermarkets, Inc., 256 NLRB 742, 742 fn. 1 (1981) ("Since [r]espondent kept the checkout area under constant closed-circuit television monitoring, we infer that [r]espondent had direct knowledge of [the employee's] union activity prior to her discharge."), enfd. 707 F.2d 236 (6th Cir. 1983).

The dissent describes our inference here as "egregious[]." But this characterization depends on (mistakenly) rejecting the view that Stetler and Martin were known union supporters and the commonsense belief that

the Respondent would likely conclude that birds of a feather flock together. We need not (and do not) find that, in the words of the dissent, the Respondent was "omniscient in the workplace," only that when it came to union activity, the Respondent was wide awake, as the record here demonstrates.

2. The Respondent's antiunion animus

Contrary to the judge and our dissenting colleague, we find that the General Counsel also met his initial burden as to the remaining *Wright Line* element. The record contains ample evidence that the Respondent harbored animus toward employees' union activities. Not only did two high-ranking officials strongly and specifically express union animus in 2007, but we also find that the Respondent's proffered justification in 2009 for selecting the five alleged discriminatees for layoff was pretextual and indicative of unlawful motivation.

a. The statements of Orr and Ostwald

In 2007, Orr ominously stated to employee Forner that the Respondent had to be "really really careful how we get rid of" union people. In a similar vein, Ostwald declared that he had wanted to "get rid of" union people during the Union's first campaign. Additionally, on an unspecified date in 2007, Orr interrogated Edick about her union activities, and, in September 2007, Orr instructed Forner to write up Hirning for talking about the Union. The judge correctly acknowledged that those statements reveal union animus. He nevertheless found, as would our dissenting colleague, that the statements were too remote in time from the 2009 layoffs to be probative of anti-union animus with regard to those layoffs. Several considerations lead us to conclude otherwise.

First, both Orr and Ostwald served as managers at the time of the September 2009 layoffs, and there is no evidence that their antiunion animus had somehow diminished or disappeared. Our dissenting colleague describes the 2007 statements as "remote in time," but they were hardly that, at least in the context of this workplace, where unionization had been an issue for several years. Indeed, Ostwald's 2007 statement (that he "wanted to get rid of [union people] the last union vote") referred to a Board election 4 years earlier, and the Respondent's

Orr left the Respondent's employ in June 2009, but returned as a consultant in mid-August 2009. Ostwald was hospitalized shortly before the layoff decisions were made, but he never left the Respondent's employ and was its highest ranking official.

¹⁰ Having weathered successive Union campaigns in 2003 and 2007, and employed individuals, like the discriminates, for both, the Respondent could reasonably expect that the Union would try again. Indeed, that is precisely what happened in 2010.

2008 "history of charges" memo (discussed below) recounted events from 2007.

Second, Orr's June 2007 statement is not some generic anti-union remark, but a remarkably revealing declaration of intent to commit serious unfair labor practices surreptitiously. Orr expressly contemplated taking great care to rid the Respondent of union supporters. ¹¹ That appears to be exactly what transpired when the opportunity arose, 2 years later, to take advantage of a forced downsizing to eliminate several union adherents.

Finally, in the "history of charges" memo, distributed to employees around July 2008, the Respondent demonstrated its continuing concern over employees' union activities and participation in Board proceedings. The memo clearly implied that those activities hurt the Respondent's bottom line and were something the Respondent wanted to end. Our dissenting colleague insists that the memo "does not contain any threat, promise or other coercive statement," but this misses the point: the memo shows that the damning statements made earlier were anything but "stale."

In these circumstances, we find that Orr's and Ostwald's anti-union statements, although they pre-date the actions at issue here, illuminate the Respondent's unlawful motive. We reject the Respondent's argument (accepted by our dissenting colleague) that the antiunion animus of Orr and Ostwald is irrelevant because Smith allegedly made the layoff decisions. As explained above, Orr participated in the layoff process, contrary to our colleague's contention. Although Ostwald did not, he was still the Respondent's highest authority at the time of the layoffs. His antiunion animus is probative of the Respondent's intent when it laid off union supporters, consistent with his expressed desire to "get rid" of "union people" in the past.

b. The June 5, 2009 memo

The Respondent's June 5, 2009 memo constitutes additional evidence of the Respondent's animus toward employees who supported the Union. That memo stated, "The company can offer a reasonable assurance of em-

ployment next fall to all employees who are willing to work with the company in positive and constructive ways in implementing necessary changes." The memo's implicit message is that employees who fail to cooperate with the Respondent in a manner it deems "positive" and "constructive" make themselves more vulnerable to layoff. And in light of the evidence discussed above, it is clear that the Respondent did not deem union activity "positive" or "constructive." The dissent says that the memo has an "obvious meaning" that has nothing to do with unionization, but this benign characterization requires that the memo be viewed outside its context in this workplace.

c. The pretextual nature of the matrix assessments

Further support for finding anti-union animus comes from the pretextual nature of the Respondent's proffered justification for selecting the alleged discriminatees, i.e., the matrix-driven layoff assessments. As the judge found, the layoff matrix was "irrational and unjustifiable in many respects, and was applied in a careless manner . .

The revision of the matrix—which made it easier to target union supporters—was highly suspicious, especially in light of the earlier antiunion statements by managers Orr and Ostwald, and the Respondent's statement to employees the preceding June that it would look to rehire employees who were willing to work with it in "positive" and "constructive" ways. The Respondent injected a substantial amount of subjectivity into the decisionmaking process by adding the "professional relationships" factor and the 5-point bonus for requests by a parent or school official to retain a particular employee. At the same time, the Respondent eliminated two objective criteria, safety and willingness to work every day both morning and afternoon, which would appear particularly relevant considerations, given the increased morning and afternoon routes that the new contract required. The Respondent offered no explanation for deleting the "willingness to work" factor.

Smith's widespread errors in calculating attendance scores further undermine the Respondent's asserted reliance on the matrix. The fact that Special Education Transportation Coordinator Smith eschewed using reliable attendance records, and incorrectly rated 19 of 28 employees suggests that she was not sincerely motivated by a desire to assess employees under the matrix's criteria. And interestingly, Employee Lynas—the vocal union supporter who served on the 2007 organizing campaign, hand-delivered the Union's campaign letter to Manager Orr, and conducted home visits—was the only employee who received an erroneously *low* score. These circumstances support an inference that she was targeted

In response to a question by employee Forner about how the Respondent would handle "the union people," Orr stated, "[W]e have to be really really careful how we get rid of them." Contrary to our dissenting colleague's suggestion, we do not view Orr as having merely described how the Respondent would treat nonemployee organizers. The term "union people" encompasses employee supporters of the Union. The nature of Orr's statement distinguishes it from the antiunion letter in *Children's Services International*, 347 NLRB 67 (2006), which used harsh language to describe the union and its supporters, but did not announce an intention to commit reprisals.

¹² See *St. George Warehouse, Inc.*, 349 NLRB 870, 878 (2007) (relying on 3-year-old unfair labor practices to find that subsequent discipline was motivated by union animus).

for layoff. See *Martech MDI*, supra (inconsistent explanation and false and shifting reasons within a context of animus support finding of discriminatory layoff); *Portsmouth Ambulance Service*, 323 NLRB 311, 318 (1997) (employer's reaction to organizational efforts indicate that individual employees' organizational efforts motivated change in their conditions of employment and disciplinary actions); *Carriage Hill Foods*, 322 NLRB 127, 130–131 (1996) (respondent seized "first opportunity" to discipline four employees identifiable as union supporters).

Additionally, Smith offered only vague and conclusory explanations for the alleged discriminatees' very low scores on the professional-relationship factor. For example, Smith testified that she gave Lynas a very low score (5 out of 20) because she had numerous complaints from one teacher and one parent about "her professionalism, her rudeness." Similarly, Smith testified that she gave Edick a zero "[b]ecause of her attitude, her professionalism in general talking about special needs students." Smith further testified that "people" would complain about Edick "weekly, numerous times— can't put a number to it—complaining about her attitude, talking about other employees, talking about management." The vagueness of Smith's explanations for the low "professionalism" scores, the inherent subjectivity of that factor and her many mistakes in calculating one of only two matrix factors based on objective data support a finding of pretext and unlawful motive.

The circumstances here undercut the Respondent's claims that its questionable revisions and rampant errors were innocent and attributable to Smith's busy work schedule at the time the layoff decisions were made. They also persuade us that the judge erred when he declined to infer unlawful motivation, despite his finding – ignored by our dissenting colleague—that the Respondent "manipulat[ed]" the matrix to "target specific employees." The judge speculated that the manipulation was not hiding unlawful discrimination, but rather an intent to eliminate the alleged discriminatees for certain other, unprotected conduct. The judge suspected that the Respondent sought to rid itself of employees Stetler and Edick because they brought a cake to the facility, which Ostwald erroneously thought was intended to celebrate Orr's layoff. But the Respondent does not purport to have relied on the cake incident. As to employee Martin, the judge speculated that the Respondent targeted her because it believed that she had discussed job security with a school district employee. The Respondent does claim to have relied on that incident when calculating Martin's professionalism score, but we have found the Respondent's claimed reliance on the matrix itself to be pretextual. A finding of pretext "rais[es] an inference of discriminatory motive," *El Paso Electric Co.*, 355 NLRB 428, 428 fn. 3 (2010), and we properly draw that inference here.

Our dissenting colleague rejects that inference, having also discounted virtually all of the evidence of antiunion animus here. He finds it implausible that the "Respondent was intent on ridding itself of preselected union supporters." But, as we have explained, the evidence here strongly supports the view that manager Orr's statement— "[W]e have to be really careful how we get rid of [union people—in fact came to pass. The Respondent's dilemma, of course, is that it was not nearly careful enough. ¹³

c. Consequences of the pretext finding

For the reasons offered, we conclude that the Acting General Counsel has carried his initial burden under Wright Line. At this juncture, the burden would normally shift to the Respondent to show that it would have laid off the employees even absent their union activities. However, where "the evidence establishes that the reasons given for the Respondent's action are pretextual that is, either false or not in fact relied upon-the Respondent fails by definition to show that it would have taken the same action for those reasons, absent the protected conduct, and thus there is no need to perform the second part of the Wright Line analysis." Golden State Foods Corp., 340 NLRB 382, 385 (2003) (citing Limestone Apparel Corp., 255 NLRB 722 (1981), enfd. 705 F.2d 799 (6th Cir. 1982)). Accordingly, we reverse the judge's decision and find that the alleged discriminatees were selected for layoff because of their union activities in violation of Section 8(a)(3) and (1) of the Act.

B. The 8(a)(4) Allegations

The complaint separately alleges that the Respondent violated Section 8(a)(4) and (1) of the Act by laying off employees Martin, Stetler, and Edick because of their actual or perceived participation in Board proceedings. Section 8(a)(4) provides that it is an unfair labor practice "to discharge or otherwise discriminate against an employee because he has filed charges or given testimony under this Act." Although the section literally protects only employees who have "filed charges or given testi-

Our dissenting colleague questions how the Respondent can be found to have lain in wait for 2 years to rid itself of the discriminatees, but that is precisely what it foretold in 2007. Asserting that we had to be "careful how we get rid of them," the Respondent seized upon the operational changes in 2009 to a three-tier system to rid itself of these union supporters. As stated in *Marcus Management*, 292 NLRB 251, 262 (1989) "there is such a thing as latent hostility which bides its time and lies in wait, seeking the appropriate occasion to work its will."

mony," it has been interpreted broadly to protect employees who have provided affidavits or sworn statements to the Board, *NLRB v. Scrivener*, 405 U.S. 117 (1972), as well as employees perceived to have filed Board charges, *Maple City Stamping Co.*, 200 NLRB 743, 754 (1972). Indeed, "[o]nce an employee has been subpoenaed he should be protected from retaliatory action regardless of whether he has filed a charge or has actually testified." *Scrivener*, 405 U.S. at 124. The Board utilizes the *Wright Line* test (discussed above) to assess allegations of retaliation in violation of Section 8(a)(4). *Allied Mechanical*, 356 NLRB No. 35, slip op. at 2 (2010) (citing *Newcor Bay City Division*, 351 NLRB 1034, 1034 fn. 4 (2007)).

Under *Wright Line*, the Acting General Counsel has satisfied his initial burden to demonstrate protected activity, employer knowledge, and animus. Stetler and Martin engaged in protected activity around July 2008 when they furnished affidavits to the Region and received subpoenas to testify at the Hirning hearing. The Respondent, through Special Education Transportation Coordinator Smith. learned that Stetler and Martin were subpoenaed when they requested leave to appear at the hearing. Further, although the Union, and not Edick, had actually filed the charge with the Board, Manager Orr perceived that Edick was the filer, accusing her of having "pressed charges on him with the Union." Although she denied the allegation, Edick admitted to Orr that she had given the Union information that led to the Union filing a charge.

Finally, the Acting General Counsel proved that the Respondent harbored animus toward employee participation in Board proceedings. As described above, Orr accused Edick of having "pressed charges on him" when she visited his office to discuss the steps she needed to take to return to work from her medical leave. The fact that Orr made this accusation, months after the charge was filed and in the context of discussing an unrelated matter, reveals the Respondent's hostility toward Edick because of her role in the charge filing. The Respondent's six-page "history of charges" memo demonstrates that the Respondent disfavored charge filing and wanted to communicate that point to the employees. Taking the "history of charges" memo together with Orr's accusation of Edick and our finding that the Respondent's proffered justification for the layoff selections was pretextual, we find the Respondent harbored animus toward filing Board charges and participating in Board proceedings. Accordingly, we find that the Acting General Counsel satisfied his initial burden of proving that the layoffs of Stetler, Martin, and Edick were motivated in part by their actual or perceived participation in Board proceedings.

As explained above, because we have found pretextual the Respondent's proffered justification for selecting Stetler, Martin, and Edick for layoff, the Respondent has, by definition, failed to satisfy its *Wright Line* defense burden. *Golden State Foods Corp.*, supra, 340 NLRB at 385. For these reasons, we find that the layoff of those three employees additionally violated Section 8(a)(4) and (1) of the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, we shall order it to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act. Specifically, we shall order the Respondent to offer the unlawfully laid-off employees immediate and full reinstatement to their former positions or, if those positions no longer exist, to substantially equivalent positions, without prejudice to their seniority or other rights and privileges previously enjoyed, and make them whole for any loss of earnings and other benefits, computed on a quarterly basis from the date of termination to the date of a proper offer of reinstatement, less any net interim earnings, as prescribed in F. W. Woolworth Co., 90 NLRB 289 (1959), plus interest as computed in New Horizons for the Retarded, 283 NLRB 1173 (1987), compounded daily as prescribed in Kentucky River Medical Center, 356 NLRB No. 8 (2010. In addition, the Respondent shall be required to remove from its files any references to the unlawful layoffs of these employees, and to notify them in writing that this has been done and that the layoffs will not be used against them in any way.

ORDER

The National Labor Relations Board orders that the Respondent, Vision of Elk River, Inc., Elk River, Minnesota, its officers, agents, successors, and assigns, shall

- 1. Cease and desist from
- (a) Laying off or otherwise discriminating against employees for supporting the Union or any other labor organization.
- (b) Laying off or otherwise discriminating against employees for participating in Board proceedings.

In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

- 2. Take the following affirmative action necessary to effectuate the policies of the Act.
- (a) Within 14 days from the date of this Order, offer Trudy Edick, Sharron Lynas, Anne Martin, Susie Stetler, and Susan Walberg full reinstatement to their former jobs

or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

- (b) Make Trudy Edick, Sharron Lynas, Anne Martin, Susie Stetler, and Susan Walberg whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, in the manner set forth in the remedy section of this decision.
- (c) Within 14 days from the date of this Order, remove from its files any reference to the unlawful layoffs, and within 3 days thereafter, notify Edick, Lynas, Martin, Stetler, and Walberg in writing that this has been done and that the layoffs will not be used against them in any way.
- (d) Within 14 days after service by the Region, post at its Elk River, Minnesota facility copies of the attached notice marked "Appendix." Copies of the notice, on forms provided by the Regional Director for Region 18, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent since August 31, 2009.
- (e) Within 21 days after service by the Region, file with the Regional Director for Region 18 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. September 28, 2012

Mark Gaston Pearce, Chairman

Sharon Block, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

MEMBER HAYES, dissenting.

Based on a flawed but ultimately balanced and sensible evaluation of the evidence presented, the judge dismissed the Acting General Counsel's allegations that the Respondent selected for layoff five employees because of their union activity and, regarding three of them, also because of their actual or perceived participation in Board proceedings. The majority reverses the judge's decision, cobbling together a rationale based largely on speculation and strained inference, anchored by two stale, 2-year-old statements, one from a manager who did not participate in the layoff selection process, and the other from a manager whose participation consisted of passive note-taking. Because the evidence is insufficient to support the Acting General Counsel's case, I would affirm the judge's dismissal of the complaint. Accordingly, I respectfully dissent.

The material facts, recounted by the majority, are not much in dispute, but several of them warrant emphasizing here. In 2007, the Union campaigned to organize the Respondent's employees, and the Board conducted an election in September of that year. The employees voted against representation by a vote of 61 to 50, and the Board certified the election results. There is no evidence that any of the alleged discriminatees engaged in any union activity in the 2 years between that election and August 2009, when the Elk River School District mandated certain changes necessitating the layoff of two of the Respondent's drivers and three of its aides. The complaint does not allege that the layoff itself was unlawful, only that the Respondent selected the five alleged discriminatees for layoff because of their bygone protected activities. According to the Acting General Counsel, the Respondent executed a "carefully calculated strategy to implement adverse action against union supporters slowly and deliberately" long after the Union's election defeat. Thus, we are to believe that the Respondent lay in wait for 2 years, in the absence of any additional union activity, to rid itself of these five (inactive) union supporters. For the reasons set forth below, I cannot agree.

¹⁴ If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

¹ As explained below, I disagree with the judge's finding that the Respondent had knowledge of union activity by three of the five alleged discriminatees.

The complaint's 8(a)(3) and (4) allegations turn on the Respondent's motive and thus are properly analyzed under the burden-shifting framework of *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982). Under *Wright Line*, the burden is on the Acting General Counsel to prove that protected activity was a motivating factor in the layoff decisions. He can satisfy his burden by demonstrating that the alleged discriminatees engaged in protected activities, that the Respondent had knowledge of those activities, and that the Respondent harbored animus against them.

All five of the alleged discriminatees engaged in protected activities—in 2007, 2 years before their layoff—and thus the Acting General Counsel has met the first element of his *Wright Line* case. I note, however, the limited scope of Stetler's, Martin's, and Walberg's activities. Stetler signed an authorization card and discussed the Union with an unspecified number of coworkers. Martin signed an authorization card, attended several off-site union meetings, and wore a union button to work one day. Walberg signed an authorization card and spoke to a handful of colleagues about the Union.² Even if the Respondent knew of their union support in 2007, common sense suggests that the memory would have faded to insignificance by 2009.

But the Respondent did not know. That is, the Acting General Counsel failed to prove that it did.³ The record contains no evidence that any agent of the Respondent observed any of Stetler's, Martin's, or Walberg's limited union activities or later learned about them. The majority's contrary finding rests on speculation and unconvincing inference.

First, the majority relies on the Respondent's "history of charges" memo to find that the Respondent knew or suspected that Martin and Stetler supported the Union. In relevant part, the memo states that "Pauline Hirning, along with union organizers from the SEIU, solicited voluntary testimony from company employees on behalf of charges being made by Hirning against the company" and that "[such employees] were subpoenaed to appear at the hearing on July 16, 2008, on Hirning's behalf."

Hirning alleged that she had been unlawfully laid off. That Stetler and Martin agreed to testify on her behalf shows that they may have had knowledge of facts relevant to her allegation. It reveals nothing about their union views. Nor does it prove that the Respondent knew or believed that Stetler and Martin had themselves engaged in any union activity or supported the Union's efforts to organize the Respondent's employees. The majority reads too much into the memo.

Likewise, the majority errs in finding that the Acting General Counsel proved that the Respondent knew that Martin wore a union button to the Respondent's annual meeting in 2007. The Acting General Counsel did not offer any evidence that an agent of the Respondent observed Martin wearing the button or even stood in close proximity to Martin that day. Nonetheless, the majority speculates that some agent of the Respondent must have seen Martin wearing the button. More than 100 employees attended the meeting, and the record lacks evidence suggesting, much less demonstrating, that it is more likely than not that Martin's button was observed.

Most egregiously, the majority finds that the Acting General Counsel proved that the Respondent knew that Walberg supported the Union merely by showing that Walberg regularly ate lunch with Stetler, Edick, and Martin. The majority speculates that "Walberg's close association with those known union supporters caused the Respondent to suspect that Walberg, too, supported the Union." As explained above, Stetler and Martin were not "known union supporters." Even assuming arguendo that they were, it is an untenable stretch to find that Walberg's lunch habits satisfied the Acting General Counsel's burden of proof, and there is no record evidence indicating that the Respondent did, in fact, suspect Walberg of sharing her lunchmates' union sympathies.

Finally, I disagree with the majority's adoption of the judge's finding that the Respondent must have known about Stetler's, Martin's, and Walberg's union activities because it allegedly closely monitored its employees. The judge found close monitoring based on three incidents. First, the Respondent's special education transportation coordinator, Colleen Smith, required Walberg to produce a doctor's note for taking sick leave that effectively extended Walberg's vacation. Second, a school district official contacted Smith and informed her that Martin and an employee of the school district had discussed whether Martin would be working for the Respondent during a summer school session. Third, several employees informed General Manager Mark Ostwald, apparently erroneously, that Stetler was celebrating Manager of Operations Brent Orr's layoff when she brought a cake to a company picnic with icing reading, "It's a good

² The record does not establish that the employees signed their authorization cards on the Respondent's premises.

³ I agree with the majority that the Acting General Counsel proved that the Respondent (1) knew of Lynas' and Edick's union activities; (2) knew that Martin and Stetler received subpoenas to testify at a Board hearing in July 2008, which hearing was cancelled; and (3) believed that Edick had participated in the filing of an unfair labor practice charge against the Respondent, which charge was withdrawn sometime in 2007.

⁴ The record reveals that the Respondent's managers knew that Stetler and Martin were two of the subpoenaed employees.

day." These three discrete events do not prove that the Respondent was omniscient in the workplace such that it must have known that Stetler, Martin, and Walberg discussed unionization, attended offsite union meetings, or signed authorization cards at unspecified locations.

Price's Pic-Pac Supermarkets, Inc., 256 NLRB 742, 742 fn. 1 (1981), enfd. 707 F.2d 236 (6th Cir. 1983), cited by the majority, is clearly distinguishable. In that case, the Board inferred that the respondent knew that an employee had distributed and received authorization cards at her checkout counter workstation because the respondent kept that area under constant closed-circuit television monitoring. There was no such monitoring here.

In short, there is insufficient evidence that the Respondent knew of Stetler's, Martin's, or Walberg's union activities, and the complaint's 8(a)(3) allegations should have been dismissed on that basis. See *Key Food*, 336 NLRB 111, 121 (2001) (dismissing unlawful discharge allegation because record lacked proof that employer was aware that employee signed authorization card).

But even assuming otherwise, the Acting General Counsel's *Wright Line* case still fails for lack of proof that in 2009, at the time of the layoffs, the Respondent harbored animus toward employees' union activities and/or participation in Board proceedings. Finding to the contrary, the majority relies heavily on statements made back in 2007 by General Manager Ostwald and Manager of Operations Orr. That reliance is misplaced.

To begin with, Ostwald played no role in the layoff decisions. He was not even on the scene. He fell seriously ill and was hospitalized in mid-August 2009, before Special Education Transportation Coordinator Smith, revising the bus routes in conformity with the school district's demands, determined that the Respondent required two fewer drivers and three fewer aides. Ostwald did not return to work until late 2009, well after the layoff decisions occurred. For his part, Orr played a ministerial role in the layoff process, merely recording the scores that Smith assigned to the employees. Because Ostwald played no role in the layoff decisions, and Orr only a ministerial one, their statements do not support a finding that the alleged discriminatees were selected for layoff because of their union activities. See JS Mechanical, Inc., 341 NLRB 353, 354 fn. 7 (2004) (superintendent's alleged antiunion statements "could not have motivated the hiring decision because he had no part in it"); *Brown & Root Industrial Services*, 337 NLRB 619, 619 (2002) (declining to infer unlawful motivation from antiunion statements of supervisor who played no role in hiring decisions).

Further diminishing the probative value of Ostwald's and Orr's statements is the fact that they were made some 2 years prior to the challenged layoffs. As the judge correctly found, the 2007 statements are simply too remote in time from the September 2009 layoffs to prove that the selection decisions were motivated by union animus. This is especially true given the fact that the Union's campaign was long defunct when the layoffs occurred. There was no union activity in September 2009 or any hint that it might start again.

The Board's decision in *Children's Services International*, 347 NLRB 67 (2006), is apposite in this regard. There, the Board found that a manager's letter, which expressed great antipathy toward the union, "d[id] not shed light on the [r]espondent's motive" in laying off prounion employees 2 years after the letter was distributed. The Board relied on the passage of time as well as an absence of evidence that the letter's author had played a role in the challenged layoffs. The statements by Orr and Ostwald are just as stale as those in *Children's Services*. Moreover, like the author of the letter in *Children's Services*, Ostwald played no role in the decision-making process; and Orr's role was merely ministerial.⁷

⁵ Smith made the layoff selections. There is no evidence that Orr assigned ratings to employees or had any other input into the scores they received. The record shows that Orr furnished Smith with a model matrix that the Respondent had used years earlier, and that Smith added a 5-point bonus feature after some unspecified discussion with Orr. That limited evidence fails to demonstrate that Orr played any material role in selecting the five alleged discriminatees for layoff.

⁶ See also New Otani Hotel & Garden, 325 NLRB 928, 939 (1998) (declining to rely on employer's alleged expression of antiunion animus 8 months before discharge in part because temporally remote); Magic Pan, Inc., 242 NLRB 840, 853 (1979) (finding employer's alleged antiunion statements made 6 months before discharge too remote to support finding of animus); Permaneer Corp., 214 NLRB 367, 369 fn. 8 (1974) (statements of union animus made 1 year before discharge were "too remote in time to constitute probative evidence of union animus at the time of [] discharge"); cf. Amcast Automotive of Indiana, Inc., 348 NLRB 836, 838-839 (2006) (2-year gap between union activity and discharge too great to support causal nexus). The majority's reliance on St. George Warehouse, Inc., 349 NLRB 870 (2007), is misplaced. In that case, the Board relied in part on a plethora of adjudicated unfair labor practices, including unlawful discharges and discipline, interrogation, impression of surveillance, solicitation of grievances, and promise of benefits to conclude that discipline imposed 3 to 4 years later was motivated by union animus. Id. at 878. The present case, which involves a few isolated statements and not a host of adjudicated unfair labor practices, is far more akin to Children's Services than St. George Warehouse.

⁷ Even apart from these considerations, I note that Orr's statement to employee Forner in 2007 is not the smoking gun the majority portrays it to be. Forner asked Orr how the Respondent would deal with "union people," not prounion employees, and hence Orr's statement that he would get rid of them arguably reveals no more than an intent to fend off the Union's nonemployee organizers by lawful means. The burden of proving unlawful motivation lies with the Acting General

The majority further overreaches by finding evidence of animus toward protected activities in the Respondent's "history of charges" memo, which circulated more than a year prior to the challenged layoffs. The memo details the unfair labor practice charges filed against the Respondent, describes the outcome of each, and identifies the costs incurred by the Respondent to defend against them. It does not contain any threat, promise, or other coercive statement. Thus, the memo neither reveals hostility toward employees' protected activities nor bridges the temporal gap between Ostwald's and Orr's 2007 statements and the August 2009 layoffs. See Section 8(c) of the Act.

Similarly, the majority errs in finding that the Respondent's June 5, 2009 memo constitutes evidence that the Respondent harbored animosity toward employees who had supported the Union. The June 5 memo does not mention the Union or unionization, which is unsurprising considering that the Union's organizing efforts had ceased nearly 2 years earlier. Nevertheless, the majority finds something nefarious in the memo's statement that the Respondent "can offer a reasonable assurance of employment next fall to all employees who are willing to work with the company in positive and constructive ways in implementing the necessary changes." Those changes included that employees would have to run more routes each day. Thus, the evident purpose behind the quoted statement was to encourage a positive, cooperative response to the demands imposed by a significantly increased workload. My colleagues pass up the obvious meaning and go for the hidden one, reading the words "positive" and "constructive" as code for "nonunion." I observe that the Acting General Counsel does not argue that the June 5 memo evidences animus toward protected activities. 8

The majority further infers unlawful motive based on its finding that the Respondent's proffered reason for selecting the alleged discriminatees was pretextual, i.e., false or not in fact relied upon. This finding is a bit elusive. The Respondent's proffered reason was that it had to lay off two drivers and three aides, and, evaluating its work force under the layoff matrix, it selected the two lowest scoring drivers and three lowest-scoring aides. There is no dispute that the selected employees had the lowest scores, so the proffered reason plainly is not false. And if the Respondent did not, in fact, rely on those

scores, how does one explain the fact that the selectees happened to have the lowest scores? Coincidence?

But that is not what my colleagues mean by "pretext" here. They contend that the revised layoff matrix was so flawed in itself, and so carelessly applied, as to permit an inference, which they draw, that the entire matrix-based evaluation process was nothing but a pretext. The process was not, as it appeared to be, merely error-prone and, to a certain extent, subjective. It was an exercise in make-believe. Smith only pretended to evaluate the employees. In reality, behind the scenes, the Respondent was intent on ridding itself of preselected union supporters. It is not at all apparent why this should be so, since the Union had been twice rejected by a majority of the Respondent's employees and had been absent from the scene for 2 years. Further, even were the Respondent intent on nipping a renascent organizing effort in the bud, why would it undertake a phony selection process that eliminated only one former leader of the union drive— Sharron Lynas, about whom Smith had received numerous complaints of rudeness---and otherwise focused on four employees who appear to have engaged in, at most, incidental union activity.

Pretext may not be lightly inferred. It must be proven, and the burden of doing so rests with the Acting General Counsel. See, e.g., *New York Telephone*, 300 NLRB 894, 896 (1990), enfd. mem. 940 F.2d 648 (2d Cir. 1991). Evidence that an employer made a poor or rash business decision does not prove pretext. *Munro Enterprises*, , 210 NLRB 403, 420 (1974). Moreover, when examining an employer's proffered justification, the Board must be careful not to improperly substitute its business judgment for that of the employer. *Aero Detroit, Inc.*, 321 NLRB 1101, 1105 (1996).

The majority finds pretext based in part on Smith's having added to her layoff analysis the "professional relationships" category and a five-point bonus for special requests by a parent or school official. According to the majority, the Respondent made it easier to target union supporters for layoff by injecting subjectivity into the decisionmaking process. My colleagues exaggerate the degree of subjectivity involved. First, the special request bonus was not subjective. If a parent or school official makes a special request for a driver or aide, that request is an objective fact. The parent or official may have had subjective reasons for making the request, but Smith considered the objective fact of the request itself. Second, Smith's scoring of employees on "professional relationships" was also largely based on objective fact. For example, Smith testified to receiving numerous complaints of Lynas' rudeness, and weekly complaints about Edick's attitude, "talking about other employees, talking

Counsel, and the record lacks definitive evidence that Orr's ambiguous reply betrayed a desire to discharge employees who supported the Union

⁸ The June 5 memo is briefly referenced in the fact section of the Acting General Counsel's brief, but he does not argue that the judge erred by failing to infer animus from it.

about management." Again, the complainants' reasons for complaining may have been subjective, but the complaints themselves were fact.

But even granting that the revised matrix imported a degree of subjectivity into the layoff-selection process, that does not show pretext. Finding that subjective criteria were considered is vastly different from proving that the Respondent used those criteria as a pretext to disguise unlawful discrimination. The Board requires affirmative proof that subjective criteria were utilized as a pretext. By finding that Smith's addition of subjective factors *in itself* evidences pretext and unlawful motivation, the majority effectively dispenses with that requirement.

Similarly, the Respondent's elimination of the safety and "willingness to work every day" factors does not support a finding of pretext. Smith testified without contradiction that she eliminated the safety factor because there had been no accidents in the preceding year (and hence, in her view, all of the drivers were similarly situated), and the aides do not drive the Respondent's vehicles. The Acting General Counsel contends that the safety category could have been retained if factors other than vehicle accidents were considered, but he neither contends nor shows that such factors were ever considered by the Respondent in prior layoffs. Unlike the majority, I do not find it suspicious that Smith eliminated the safety category rather than drilling down below the primary safety concern of a company engaged in the business of driving: traffic accidents. By faulting the Respondent on this front, the majority substitutes its business judgment for that of the employer, contrary to Board precedent.

Regarding the "willingness to work every day" category, the majority notes its elimination went unexplained. However, the Acting General Counsel bears the burden of proving pretext, and he did not ask Smith at trial to explain why she dropped that factor. More importantly, the Acting General Counsel fails to point to any evidence that, had the matrix retained the safety and "willingness to work every day" categories, and had the safety factor been more broadly interpreted and applied, any alleged discriminatee would have benefited and been less susceptible to layoff. This lack of proof is fatal to the Acting General Counsel's argument on this point.

According to the majority, pretext is also evident from Smith's errors in calculating employees' attendance scores. However, Smith's errors actually *benefited* Stetler, Walberg, and Edick, which undermines the majority's notion that the Respondent manipulated the attendance factor to discriminate against them. It is true that Smith's errors cost alleged discriminatee Sharron Lynas five points, but even had the attendance scores been calculated accurately, Lynas still would not have avoided layoff. Under these circumstances, Smith's errors cannot possibly support the majority's finding that the matrix was used as a pretext to disguise unlawful discrimination.

Finally, having disagreed that the "professional relationships" factor was irredeemably subjective, I also disagree with the majority's assertion that Smith's testimony concerning the alleged discriminatees' scores on that factor was suspiciously vague. Questioned on this subject 6 months after she made the layoff decisions. Smith explained the complaints that formed the basis for the employees' scores. She identified the sources and general tenor of those complaints. In my view, her testimony does not reasonably raise suspicions sufficient to justify an inference that the matrix was used as a pretext for union discrimination. In finding to the contrary, the majority essentially reverses the burden of proof, requiring the Respondent to prove that its proffered explanation was not pretextual in order to avoid a finding of unlawful motivation. This our case law does not permit. New York Telephone, 300 NLRB at 896.

In light of these glaring weaknesses in the majority's pretext rationale, one thing becomes clear. Were it not for the fact that Orr made that remark about being "really really careful" about getting rid of "union people," the pretext inference would be simply untenable. It is only in the glare of that statement that the hints and clues that are grist for the majority's speculation mill take on a lurid hue. The whole case really comes down to that remark, made in 2007 when a union campaign was ongoing. That campaign failed. The employees rejected the Union. Two years passed without any union activity. The remark was ancient history, and Board precedent supports disregarding it. For reasons outside the Respondent's control, layoffs became necessary. Employees were evaluated based on objective facts, by Smith, not Orr. In doing so, Smith made mistakes, which lowered the score of one alleged discriminatee—who would

⁹ See *FES*, 331 NLRB 9, 13 (2000) ("Regardless of whether subjective or objective employment criteria are at issue in the position for which applicants apply, the General Counsel may show, in the alternative, that the employer did not uniformly adhere to the announced requirements, or that the requirements were, themselves, pretextual or pretextually applied.").

The record shows that even if 5 points were added to Lynas' total score, she would have received 15 points—3 fewer than the 18 points received by the lowest scoring aide who was retained. The Respondent accurately calculated the attendance score of the remaining alleged discriminatee, Martin.

have been laid off anyway even absent the mistake—and raised the scores of three others. In short, the record evidence fails to support the Acting General Counsel's theory that the layoffs were part of a carefully calculated strategy to rid the Respondent of the alleged discriminatees because of their long-past protected activities. Furthermore, none of the alleged 8(a)(4) discriminatees ever testified against the Respondent's interests, and the relevant charges were withdrawn or settled long before the layoffs. Finally, to the extent the Acting General Counsel contends that the Respondent lay in wait for 2 years to retaliate against an employee for eating lunch with coworkers allegedly known to have supported the Union, neither the record nor common experience justifies that speculation.

I would dismiss the complaint in its entirety.
Dated, Washington, D.C. September 28, 2012

Brian E. Hayes,

Member

NATIONAL LABOR RELATIONS BOARD APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT lay off or otherwise discriminate against you for supporting the Union or any other labor organization.

WE WILL NOT lay off or otherwise discriminate against you for participating in Board proceedings.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights listed above.

WE WILL, within 14 days from the date of the Board's Order, offer Trudy Edick, Sharron Lynas, Anne Martin, Susie Stetler, and Susan Walberg full reinstatement to

their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

WE WILL make Trudy Edick, Sharron Lynas, Anne Martin, Susie Stetler, and Susan Walberg whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, less any net interim earnings, plus interest.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful layoffs of those employees, and WE WILL, within 3 days thereafter, notify them in writing that this has been done and that the layoffs will not be used against them in any way.

VISION OF ELK RIVER, INC.

Florence I. Brammer, Esq., for the General Counsel.

Thomas R. Revnew, Esq. and Jon S. Olson, Esq., of Minneapolis, Minnesota, for the Respondent.

DECISION

STATEMENT OF THE CASE

RICHARD A. SCULLY, Administrative Law Judge. Upon a charge filed on November 9, 2009, by Susie Stetler, an individual, the Regional Director for Region 18, National Labor Relations Board (the Board), issued a complaint on February 11, 2010, alleging that Vision of Elk River, Inc. (Respondent) had committed certain violations of the National Labor Relations Act (the Act). Respondent filed a timely answer denying that it had committed any violation of the Act.

A hearing was held in Minneapolis, Minnesota, on March 16 through 19, 2010, at which all parties were given a full opportunity to examine and cross-examine witnesses and to present other evidence and argument. Briefs submitted on behalf of the General Counsel and Respondent have been given due consideration. Based on the entire record, and from my observation of the demeanor of the witnesses, I make the following

FINDINGS OF FACT

I. JURISDICTION

At all times material, Respondent was a Minnesota corporation with offices and places of business in Elk River and Rogers, Minnesota, providing services to the Elk River, Minnesota School District, including transporting students to schools by bus and providing charter services for school-related activities. During the calendar year 2009, Respondent, in the conduct of its business operations, derived gross revenues in excess of \$500,000 and purchased and received goods and supplies valued in excess of \$50,000 directly from suppliers located outside the State of Minnesota. Respondent admits, and I find, that at all times material it was an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. THE LABOR ORGANIZATION INVOLVED

Respondent admits, and I find, that at all times material, Service Employees International Union (SEIU), Local 284 (the Union) has been a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

Since 2000, Respondent has performed under a series of contracts with the Elk River School District (ERSD) providing transportation for it students. Respondent provides buses and drivers for what are referred to as "regular education" routes and buses, vans, drivers, and aides for what are referred to as "special education" routes. The issues involved in this proceeding concern an August 2009 layoff of drivers and aides who worked on the special education routes. The parties agree that the layoffs were occasioned by a restructuring by ERSD of its transportation system which resulted in fewer drivers and aides being needed for the special education routes operating in the 2009–2010 school year. There is no dispute that the layoffs were the result of an economic decision by ERSD to restructure its special education routes. However, the complaint alleges that Respondent selected certain drivers and aides for layoff in a discriminatory manner because those employees engaged in or were perceived to have engaged in protected concerted activities and support for the Union and/or because they cooperated with the Board in connection with the processing of a representation petition filed by the Union and the investigation of unfair labor practice charges in violation of Section 8(a)(3), (4), and (1) of the Act.

Counsel for the General Counsel contends that Respondent created and applied a matrix of components to be used in determining who in the special education department would be laid off that was designed to target certain employees because of their support for the Union and/or their cooperation with the Board. She asserts that the matrix Respondent used was unsupportable and subjective and was "designed, tweaked and manipulated" in order to reach the desired end of removing the five targeted individuals.

Respondent contends that there is no evidence that its decision to lay off the five alleged discriminatees was based on union animus, that the evidence fails to establish that it had knowledge of any protected activity on the part of one or more of the alleged discriminatees, and that the protected activities it did know about were so remote in time that there can be no causal connection with the layoffs in August 2009. It asserts that even though it may have made mistakes in applying the criteria of the matrix, there is no evidence that it violated the Act by selecting any of these five individuals for layoff.

Background Facts

Respondent was formed in January 2000, and has provided transportation services for ERSD since that date. It took over those duties from an entity known as Billmar Transportation which had a collective-bargaining relationship with the Union. There have been three attempts by the Union to organize Re-

spondent's employees and representation elections have been held during the 2002–2003, 2007–2008, and the current school year. The Union also filed a number of unfair labor practices charges against Respondent.

Mark Ostwald has been Respondent's general manager since its formation and has overall responsibility for oversight of its facilities, management staff, and employees. Brent Orr served as the manager of operations at the Elk River facility from July 2006 until June 2009, when he was laid off. Orr returned to work for Respondent as a consultant from mid-August to mid-October 2009, when Ostwald was incapacitated due to illness. Colleen Smith has been employed by Respondent since January 2000, and has served as its special education transportation coordinator for approximately 8 years. In that position, she designs the special education routes, assigns drivers and aides to those routes and supervises those employees.

Respondent and ERSD began negotiating a new contract during the early part of 2009. The resulting agreement changed what had been a "two-tier" system in which the school buses made two runs in the morning and two runs in the afternoon to a "three-tier" system in which the school buses made three runs in the morning and three in the afternoon. This resulted in the need for fewer buses to transport the students. In April 2009, ERSD also informed Respondent that it was changing the method for assigning aides to special education routes. Instead of there being an aide assigned to every special education route, an aide would be assigned only to a route on which there was a specific student need for one, which Orr has described as "a substantial departure from past practice." However, in an end of the 2008-2009 school year communication to employees signed by Ostwald and Orr, Respondent advised them that although ERSD was proposing a number of significant changes in the transportation services being provided, "the company can offer a reasonable assurance of employment next fall to all employees who are willing to work with the company in positive and constructive ways in implementing the necessary changes."

Operative Facts

On August 13, 2009, Respondent held its annual preschool year meeting and training session for all employees. No special education route assignments were made at that time but there was no mention of any layoffs. Smith testified that she had not yet developed those routes because she had not received the information she needed to do so from ERSD. The route preparation process begins when Smith gets requests for special transportation from ERSD. She said that in 2009, these requests began to trickle in during the last 2 weeks of August. Once she got the requests, which include the identity of the students, their addresses, any physical impairments, the schools, grades, the type of vehicle and any special equipment needed, and any other specific needs, she began to set up the routes. She said that it took her about 2 weeks of 10- to 16hour days to accomplish this. The process differed from previous years because of the switch to the three-tier system and the fact that aides were to be assigned to vehicles only when there was a specific need.

¹ Respondent also provides a third type of service involving charter buses which is not directly involved here.

Smith testified that it is not until after the routes are developed that she makes the assignments of the drivers and aides. In 2009, once she had the routes done, she found there were fewer routes than in previous years and that not all of the existing drivers and aides were needed to cover them. In order to determine who would be given routes and who would be laid off she used a matrix of components to rank the special education employees. The two lowest ranking drivers and three lowest ranking aides were laid off.

According to Smith, Orr provided her with a matrix that had previously been used in selecting regular education drivers for layoff as there had never been layoffs in the special education department. That version of the matrix took into consideration, seniority, the previous year's attendance and safety record, and whether the driver was willing to drive every day and in the morning and afternoon. Counsel for the General Counsel contends that the revised matrix that Smith developed and used was designed to achieve the end of eliminating the five alleged discriminatees inasmuch as if she used the matrix Orr provided their rankings would have allowed all of them to keep their jobs. Smith said she had to revise the matrix because it only applied to drivers and not to aides. She did not explain why she had to use a single matrix for what are significantly different positions with different responsibilities and which were ranked separately. Smith said that she took out the safety component, which provided for a score of up to 30 points out of 100, because there had been no accidents during the previous year. It is difficult to understand her reasoning, since numerous factors short of an actual accident would appear to have a bearing on an employee's overall safety record and safety was allegedly a primary concern of the Respondent. She also removed the components relating to willingness to work which also adversely impacted the discriminatees' scores and inserted two new categories, "professional relationships" and customer requests for a particular a driver and/or aide. This in effect removed two objective criteria and replaced them with two totally subjective criteria which enabled Smith to manipulate the scoring any way she chose since she alone determined what constituted a positive "professional relationship" and she alone knew whether a specific driver or aide was the subject of a customer request.

In a memorandum, dated August 31, 2009, Smith informed the special education drivers and aides that ERSD, in an effort to reduce expenditures, had "changed the general approach to special education transportation," resulting in fewer drivers and aides being needed for the 2009-2010 school year. The memo states that in order "to ensure a fair procedure for assigning work" and to "provide the best staff possible for serving the transportation needs of special education students," a matrix had been developed to rank current drivers and aides and determine the order in which will be assigned available work. It states that the matrix takes into consideration "longevity with the company; attendance/dependability; professional relationships with district staff and students, patrons, and work colleagues, as well as special customer requests." It states that the drivers and aides "may request a copy of the matrix" and their "overall ranking on the work assignment list."

After applying the matrix criteria, Smith determined that drivers Susie Stetler and Anne Martin and aides Trudy Edick, Sharron Lynas, and Susan Walberg would be laid off. None of the five employees was actually formally notified by Respondent that they had been laid off. They learned of their fate when, as the start of the school year approached and they had not received route assignments, they called or went to the facility and were told that there no routes for them.

Analysis and Conclusions

The General Counsel contends that Respondent had targeted each of the five alleged discriminatees for removal from its employ because of their support for the Union and/or because they had cooperated with the Board in connection with an unfair labor practices charge that had been scheduled for hearing in July 2008, but was settled before the hearing commenced. Respondent asserts that the alleged discriminatees were laid off because there were not enough positions available in the 2009–2010 school year and an evaluation of their work performance resulted in their being ranked lower than other employees competing for the same jobs.

In a case such as this, where the employer's motivation for a personnel action is in issue, it must be analyzed in accordance with the test outlined by the Board in Wright Line, 251 NLRB 1083 (1980), enfd. 662 F.2d 800 (1st Cir. 1981), cert. denied 455 U.S. 393 (1982), approved in NLRB v. Transportation Management Corp., 462 U.S. 393 (1983). Under Wright Line, the General Counsel must introduce persuasive evidence that animus toward protected activity was a substantial or motivating factor in the employer's decision. Once that has been done, the burden of persuasion shifts to the employer to demonstrate that it would have taken the same action even the absence of protected activity on the part of the employee. Manno Electric, 321 NLRB 278, 280 fn. 12 (1996). To sustain his initial burden, the General Counsel must show (1) that the employee has engaged in protected activity; (2) that the employer had knowledge of that activity; and (3) that such activity was a substantial or motivating reason for the employer's adverse action. Naomi Knitting Plant, 328 NLRB 1279, 1281 (1999). In other words, there must be a motivational link or nexus between union animus and the adverse employment action. American Gardens Management Co., 338 NLRB 644, 645 (2002). Moreover, this nexus "must rest on something more than speculation and conjecture." Amcast Automotive of Indiana, Inc., 348 NLRB 836, 839 (2006). Direct evidence of unlawful motivation is seldom available and it may be established by circumstantial evidence and the inferences drawn there from. E.g., Abbey Transportation Service, 284 NLRB 689, 701 (1987); FPC Mouldings, Inc. v. NLRB, 64 F.3d 935, 942 (4th Cir. 1994); Shattuck Denn Mining Corp., 362 F.2d 466, 470 (9th Cir. 1966).

1. Employees' union support and activity and employer knowledge

Respondent contends that it had no knowledge that any of the five alleged disciminatees had engaged in any activity protected by the Act. As noted above, the Union has made three attempts to organize Respondent's employees and has filed several unfair labor practices charges against it. During the 2007 organizing campaign Trudy Edick attended union meetings, spoke to other employees about the Union, and solicited authorization cards. She wore a pro-Union button on her shirt at work and at the annual employee meeting. Her picture appeared in a union newsletter distributed to employees who had signed authorization cards during the summer of 2007, and she was quoted as being in favor of union representation. Edick credibly testified that prior to the September 2007 representation election, she was called into Orr's office where Manager James O'Neill was also present and there was a discussion about her union activity. They accused Edick of having disclosed to the Union a list of employee names and addresses which she had in connection with her involvement with the company newsletter.² O'Neill said that since all management employees had denied giving out the list, they assumed that it was Edick who did so. Later in 2007, Edick was again called into Orr's office where he accused her of having "pressed charges on him with the Union," a reference to a charge that was filed by the Union after the accusation that she had disclosed the list of employee names. In the summer of 2008, Orr posted in the breakroom and distributed a memorandum he had prepared "as an informational item for the employees" outlining "a history of charges, complaints and Union action" brought against Respondent by the Union which he said required it to divert resources that might have been used for other purposes such as the purchase of new equipment or raising wages. Included was a charge arising from his accusations that Edick had disclosed confidential personnel information. Orr also noted that he had received a "cease and desist" letter from the SEIU by fax within 3 hours of his conversation with Edick about the list of names.

Despite this, Orr denied any knowledge that Edick had ever engaged in any union activity. He said that Edick had denied contacting the Union about disclosure of the list of names and that he "absolutely" believed her. Edick credibly testified that she told Orr she did not initiate the charge herself but had told union organizers about his accusations which led to the Union filing a charge. Moreover, as is discussed below, the evidence as a whole shows that there was very little that was said or done by Respondent's employees concerning the workplace that did not promptly make its way to its managers. I find that Respondent was aware that Edick was a supporter of the Union and that she had engaged in protected activity.

Susie Stetler was a driver at the Elk River facility before being laid off. She credibly testified that she had signed a union authorization card and spoke with employees about the Union. She said that she was asked questions about the Union at the Respondent's facility on a daily basis as she was one of the few current employees that had previously been a member of the Union. One of the charges filed by the Union in 2008 involved the discharge of an employee named Pauline Hirning. A hearing on the resulting complaint was scheduled to be held in July 2008, but the case was settled before the hearing opened. Stetler gave an affidavit to the Board in connection with the Hirning case and was subpoenaed to testify at the hearing. Stetler was driving a summer school route as a substitute and

was scheduled to drive on the date of the hearing. She credibly testified that she told Smith that she had been subpoenaed and would need the day off and Smith said, "Okay."

Respondent presented testimony from its Supervisors Orr and Smith who said that they had no knowledge of any protected activity on the part of Stetler or that she was involved with the Hirning unfair labor practices hearing. However, in Orr's "history of charges" memo he states:

On July 3, 2008, company dispatch was informed that an unknown number of employees, d[r]iving and assisting in summer school, were subpoenaed to appear at the hearing on July 16, 2008, on Hirning's behalf. Some employees indicated to dispatch that they would not be able to drive summer school on July 16, 2008 (the next to last day of summer school) because they would have to answer the subpoena.

There can be little doubt that Smith was the dispatch person to whom employees reported when they needed to be off from work and she was responsible for replacing them. Orr's memo admits that Respondent knew that employees had been subpoenaed to appear at the hearing and would not be able to work that day. The only source of this information would have been the employees themselves who told Smith they needed to be off. Respondent argues that because there is no notation in Smith's planner book in which she recorded time off requests and there is no written request for time off from Stetler in the record, Smith's claim of lack of knowledge should be believed. I do not agree. Although Orr claimed he could not remember who told him about the subpoenaed employees or who they were, he admittedly got his information from "dispatch" (Smith) who knew which employees had been subpoenaed and had requested to be off on July 16. I cannot credit Smith's testimony that she was never informed that Stetler had been subpoenaed and intended to testify at the Hirning hearing. Moreover, Orr's assertion that the employees were subpoenaed to testify "on Hirning's behalf" indicates that Respondent considered those employees to be supporters of Hirning and the Union. I find that Respondent had knowledge of Stetler's involvement with the Board hearing and believed that she supported the Union.

Prior to being laid off Sharron Lynas was a special education aide. She was a member of the Union's organizing committee during its 2007 organizing campaign. She signed and participated in the hand delivery of a May 16, 2007 letter informing Respondent of that fact. Orr acknowledged that Lynas had been involved in the delivery of the letter in his office. Lynas also was pictured and quoted as being in favor of representation by the Union in the same union newsletter in which Edick appeared and signed two letters distributed to employees to keep them updated during the summer. She hosted union meetings at her home and went door-to-door soliciting employees to sign authorization cards and to support the Union. Orr's "history of charges" memo specifically mentions that union organizers were contacting employees at their home "to discuss unionizing the company." It is simply not believable that Respondent was not told the names of the employees making the home visits and that it did not know that Lynas was involved. I find that

² According to Edick's credible testimony, she did not have a list of employees' addresses, only their names.

Respondent had knowledge of Lynas' union activity and support.

Anne Martin was a driver at the Elk River facility before being laid off. Lynas worked as the aide on Martin's bus. Martin testified that she signed an authorization card during the 2007 campaign, attended union meetings, and wore a pro-Union button throughout the day-long annual meeting and training session. Martin credibly testified that she was subpoenaed to testify at the Hirning hearing and that she informed Smith of this fact about 2 weeks before the July 16 hearing date. Once again Respondent claims that Smith's denial that she knew Martin had been subpoenaed and the fact that there is no notation in her planner or a time-off request in the record should be credited over Martin's testimony. Again, I do not agree. The fact is, as attested to by Orr, Respondent knew that employees were subpoenaed and had requested time off from "dispatch." Respondent cannot explain how Orr could have known this if the employees had not informed Smith, the dispatch person who had to arrange for their substitutes, that they had been subpoenaed and needed to be off.

Susan Walberg was a special education bus aide for 5 years prior to her layoff. She had been the aide on Stetler's bus before being transferred to the Rogers facility for the 2007-2008 school year. However, each day she drove back to the Elk River facility in order to have lunch there with her friends Stetler, Edick, and Martin. Walberg had signed a union authorization card and spoke with other employees about the Union but engaged in no other protected activity.

Although Respondent claims that it had no knowledge of any union activity on the part of any of the alleged discriminatees, I find that such knowledge has been established or can be inferred from the evidence in the record as a whole. There is direct evidence that Orr was aware of the Union involvement of Lynas and Edick and that Smith and Orr knew that Stetler and Martin were going to appear at the Hirning unfair labor practices hearing in support of the Union's charge against Respondent. It also knew that Walberg was a close friend and associate of the other four alleged discriminatees.

The employees in the special education department were a small group and apparently closely watched by Respondent's supervisors. Walberg testified that in May 2009 she called in sick one morning for the first time in 2 years. A matter of hours later, while at the doctor's office, she received a call on her cell phone from Smith who told her she had to get a note from the doctor even though it was company policy that a doctor's note was required only after 3 days of absence. Later that day, Smith told Walberg she would also need a note from the doctor saying that she was capable of performing her duties as an aide although there is nothing to suggest that Respondent had reason to believe she was impaired. When Walberg got a copy of her personnel file after her layoff, the doctor's note contained a notation indicating that Orr was the source of the note requirement and that O'Neill had also been involved. Respondent apparently contends that Walberg's sick leave request was questionable because it was in close proximity to a day of leave she had also requested. True or not, this incident demonstrates that Respondent closely monitored all aspects of the employees' activities and undermines its claim that it had no knowledge of their union activity or support.

Another example of this involved Martin. She had a second job as a cashier at a department store where prior to the start of summer school in 2009 she encountered a teacher's aide from an ERSD school. While checking out her purchases, Martin had a brief conversation with the aide about whether Martin would be driving during the summer school session. Some version of this private conversation was reported to Respondent who accepted as true without any further inquiry. On June 3, 2009, Smith issued a memo to employees stating that she had received a complaint about "inappropriate" comments and remarks made by a special education employee to ERSD personnel and threatening that if it happened again, the employee would be terminated immediately."

Yet another incident involved Stetler and Edick. Toward the end of the 2008–2009 school year, special education employees planned a pot luck lunch at the Elk River facility. Stetler testified that she brought in a cake she had purchased early that morning on which was written, "It's a Good Day." After arriving at the facility she learned for the first time from a company newsletter that Orr had been laid off. She testified that the cake had nothing to do with Orr's layoff and that she made no comments to anyone relating it to his layoff. Prior to the afternoon routes, Ostwald approached Stetler and Edick at a picnic table and angrily accused them of bringing the cake to celebrate Orr's layoff. He described Orr as not just a manager but also a friend of his. He told them he considered childish behavior and said they would not have jobs there in the fall and should be looking for different work. Ostwald admitted that he had not seen the cake and did not even know what it said. He simply accepted the representations of an unidentified employee that Stetler and Edick brought it in to celebrate Orr's layoff.

It is against this background that Respondent's claims that it had no knowledge of any union activity or support on the part of any special education employee must be weighed. The evidence shows that Respondent was informed as to what those employees were doing, not only at its facilities, but in private conversations in nonwork contexts. It shows that it was willing to accept such reports as true without any investigation or providing employees with an opportunity to explain. Under the circumstances I cannot credit its claims that it did not know or suspect union support on the part of employees who were identified as on the Union's organizing committee, who wore pro-Union buttons to company meetings, who solicited authorization cards from company employees, who spoke to employees about the Union on its vehicles and in its facilities, who made it known that they were going to appear at an NLRB hearing as witnesses in support of the Union's charges, or who were closely aligned with such employees.

2. Evidence of animus and its relationship to the layoffs

Terry Forner was previously employed by Respondent for 5 years as a field trip driver. He was employed during two of the Union's organizing drives and described himself as "very antiunion." He testified that on June 7, 2007, the last day of the school year there was an employee picnic. Forner testified that there was union organizing going on and that he had a conversation with Orr in the parking lot in which he asked Orr what he was going to do about "the union people." Orr responded, "[W]e have to be really really careful how we get rid of them." Forner said he also had a conversation with Ostwald on the same day in which asked how Ostwald was going to take care of the union people. Ostwald responded that he wanted to get rid of them at the time of the last union vote, but that Arlene Cunningham, a former manager, talked them out of it. Forner also testified that in September of 2007, a week after the Union lost that representation election, he had a conversation with Orr in his office at which O'Neill was also present. Orr told Forner to write up employee Pauline Hirning for talking to Forner about the Union. Former said he would but never did so.

Ostwald generally denied having any conversations with Forner concerning unions. I do not credit his denials which lacked any detail or context. They consisted entirely of monosyllabic answers to leading questions by Respondent's counsel which incorrectly paraphrased some of Forner's testimony. The same is true of Orr. He generally denied speaking to Forner about getting rid of union supporters, saying, "I don't think I ever had that kind of conversation with Mr. Forner, no." He also denied asking Forner to write up Hirning. As was the case with Ostwald, Orr's denials were elicited through leading questions by Respondent's counsel which lacked context and incorrectly paraphrased some of Forner's testimony.

I find Respondent's attacks on Forner's credibility as a "disgruntled employee" with a "grudge" against it are not persuasive. The evidence shows that Forner guit his job with Respondent after being questioned about a verbal altercation with a museum guard about parking a bus during a field trip. He may well have "a temper," as indicated by his precipitously quitting his job when by his understanding he was falsely accused of wrongdoing by a third party, but there is no evidence suggesting that he harbors such ill-will toward Respondent that he would be willing to commit perjury. Likewise, there is nothing to support Respondent's contention that Forner voluntarily came forward during the Board's investigation "for the purpose of satisfying his grudge." Forner gave credible and detailed testimony about his conversations with Ostwald and Orr, which was countered by their general denials. Orr did testify that he was not Forner's direct supervisor and would have been unlikely to have the kind of conversation about Hirning that Forner described. On the other hand, there is no reason for Forner to have testified that O'Neill was present during the conversation with Orr involving Hirning if he was fabricating it. O'Neill made two appearances to testify during the hearing but was not asked about the Hirning conversation which suggests his testimony would not have supported Respondent's position.

Although I credit Forner's testimony, the comments by Ostwald and Orr about getting rid of union supporters were made over 2 years before the instant layoffs and at least in the case of Ostwald contained no actual threat. When these layoffs occurred Ostwald was incapacitated by a serious illness and clearly had no active involvement in the layoff decisions. At that point, Orr had himself been laid off and had briefly returned on a consulting basis because of Ostwald's illness. Under the circumstances, I cannot conclude, as the General Coun-

sel contends, that these layoffs were the culmination of a longterm, sophisticated plan whereby Respondent bided its time and lay in wait for "the appropriate occasion to work its will" by weeding out union supporters. This particularly true since the "appropriate occasion," the genuine need to layoff employees, is not disputed and resulted from ERSD's decisions not Respondent's.

I find there nothing else in the record to establish that Respondent harbored union animus at the time the instant layoffs occurred. Although over the years the Union had made more than one attempt to organize Respondent's employees and had filed a number of unfair labor practices charges against it, there have been no findings that it has violated the Act. Only one charge resulted in a complaint being issued and that case was settled prior to the hearing. Although counsel for the General Counsel asserts that Respondent has "distributed lengthy and sophisticated communications to its employees on the subject of union and other protected activity," including, Orr's "history of charges" memo, there are no independent allegations of any conduct violating Section 8(a)(1) in the complaint in this matter.

The end of school year conversations Forner testified about occurred over 2 years prior to these layoffs and the "history of charges" memo was more than a year before. The Hirning hearing to which employees had been subpoenaed was scheduled to commence over a year before. Respondent relies on numerous cases in which the Board has found that such gaps in time between expressions of union animus and adverse personnel actions negated a finding that there was a nexus between the two. E.g., Amcast Automotive of Indiana, Inc., supra; Children's Services International, 347 NLRB 67, 69 (2006); Central Valley Meat Co., 346 NLRB 1078, 1079 (2006). I find nothing here which mandates a different result. There was a significant lapse of time between the last evidence of any union animus by Respondent and the layoffs in August and September 2009, as well as the last evidence of protected activity by any of the alleged discriminatees and the layoffs.

Much of the General Counsel's evidence and argument in this case was devoted to establishing that the matrix of criteria Respondent used to determine who would be laid off was anvthing but an objective analysis of its employees' performance, was irrational and unjustifiable in many respects, and was applied in a careless and manipulative manner to target specific employees. I agree and find this to be the case. That being said, there is nothing in the design or application of that matrix that demonstrates current union animus or establishes the needed nexus between animus and the adverse personnel actions. It may raise suspicions, but that is not enough. I find there is much stronger evidence that Stetler and Edick were targeted for layoff because of their involvement in the cake incident at the close of the previous school year. Ostwald obviously believed, rightly or wrongly, that they were celebrating the layoff of his friend Orr and told them their jobs were in jeopardy because of it. Respondent also appears to have had it in for Martin because it believed she had what it considered an improper discussion with an ERSD employee when its contract negotiations with ERSD were at a delicate stage, just before the end of the previous school year. Neither of these incidents involved employee activity protected by the Act. Whether they constitute good reasons or bad reasons for Respondent's manipulating the matrix to rid itself of what it may have considered undesirable employees, they do not constitute reasons that violate the Act.

In summary, I find that the General Counsel has established that the alleged discriminatees had engaged in protected activity and that Respondent had knowledge of that activity. I also find that the evidence of union animus on Respondent's part is too remote to support an inference that it was the motivation for its decision to lay off any of the alleged discriminatees in 2009. Accordingly, I find that the General Counsel has not established a prima facie case by showing that there was a nexus between Respondent's union animus and the layoffs of the alleged discriminatees and I shall recommend that the complaint be dismissed.

CONCLUSIONS OF LAW

- 1. The Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.
- 2. The Union is a labor organization within the meaning of Section 2(5) of the Act.
- 3. The Respondent did not commit any of the violations of Section 8(a)(3) and (1) of the Act alleged in the complaint.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended³

ORDER

The complaint is dismissed in its entirety. Dated Washington, DC July 7, 2010

³ If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.